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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. EC-13-1048-KiPaJu
	)	
ERNEST FELIPE ROQUE,	)	Bk. No. 11-15299
	)	
Debtor.	)	Adv. No. 11-1217
_____	)	
	)	
ERNEST FELIPE ROQUE,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
RAFAELA YNIGUEZ,	)	
	)	
Appellee.	)	
_____	)	

Submitted Without Oral Argument  
on October 18, 2013<sup>2</sup>

Filed - January 31, 2014

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable Frederick E. Clement, Bankruptcy Judge, Presiding

Appearances: Appellant, Ernest F. Roque, pro se, on brief; Cyril  
L. Lawrence, Esq. on brief for appellee, Rafaela  
Yniguez.

Before: KIRSCHER, PAPPAS and JURY, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may have  
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th  
Cir. BAP Rule 8013-1.

<sup>2</sup> On August 26, 2013, the Panel unanimously determined that  
this appeal was suitable for submission on the briefs and record  
without oral argument pursuant to Fed. R. Bankr. P. 8012.

1 Appellant, chapter 7<sup>3</sup> debtor Ernest Felipe Roque ("Roque"),  
2 appeals an order of the bankruptcy court granting the motion of  
3 appellee, Rafaela Yniguez ("Yniguez"), for summary judgment  
4 determining that Roque's debt to her was excepted from discharge  
5 under § 523(a)(2)(A). Roque also appeals an order denying his  
6 motion for a continuance of the motion for summary judgment and  
7 two orders granting Yniguez's motions to compel discovery. We  
8 AFFIRM the order denying Roque's motion for a continuance and  
9 AFFIRM the orders granting Yniguez's motions to compel. However,  
10 because the record does not support the order granting summary  
11 judgment under § 523(a)(2)(A), we VACATE and REMAND.

## 12 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### 13 A. Prepetition events

14 Yniguez is a former employee and the ex-fiancee of Roque, who  
15 owns and operates an insurance agency in Los Banos, California.  
16 This nondischargeability action arises out of a series of loans  
17 Yniguez made to Roque for the purpose of developing his insurance  
18 business, EFR Insurance Agency ("EFR"), which at the time was  
19 being operated as a sole proprietorship.

20 On September 18, 2009, the parties entered into a written  
21 agreement ("Agreement"), wherein Yniguez agreed to loan Roque  
22 \$25,000 without interest. In return, Roque agreed to pay Yniguez  
23 at least \$5,000 per year starting on September 18, 2010, for a  
24 period not to exceed five years or until the loan was paid in  
25 full. In return for not charging interest, Roque agreed that

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26  
27 <sup>3</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 Yniguez would receive a five percent (5%) ownership interest in  
2 EFR and a five percent (5%) ownership share of EFR's net profits  
3 starting January 1, 2011.

4 On November 21, 2009, an addendum was made to the Agreement.  
5 Yniguez agreed to loan Roque an additional \$22,000 without  
6 interest (for a total loan of \$47,000.00), with the same payment  
7 terms of at least \$5,000 per year starting on September 18, 2010,  
8 for a period not to exceed five years or until the loan was paid  
9 in full. In return for not charging interest, Yniguez would  
10 receive an additional five percent (5%) ownership interest in EFR  
11 and a ten percent (10%) ownership share of EFR's net profits,  
12 starting January 1, 2011.

13 In addition to the loans evidenced by the Agreement and  
14 addendum (the "Written Loans"), and before any payments for those  
15 loans became due, Yniguez provided a series of loans to Roque  
16 and/or EFR totaling \$82,190.00 based on oral agreements:

- 17 • February 25, 2010: Roque \$36,000 (with an agreement of  
18 repayment and a fifty percent (50%) interest in EFR);
- 19 • April 21, 2010: Roque \$5,000;
- 20 • May 24, 2010: Roque \$5,000;
- 21 • July 3, 2010: Roque \$17,500;
- 22 • September 10, 2010: EFR \$17,500;
- 23 • September 14, 2010: EFR \$1,190.

24 After the September 18, 2010 payment for the Written Loans  
25 had become due, and Roque had not made any payment, Yniguez made  
26 two additional loans to EFR by oral agreement totaling \$33,000 –  
27 one on October 6, 2010, for \$3,000 (for the purchase of office  
28 equipment, computer components and software), and the other on

1 November 15, 2010, for \$30,000 (all loans by oral agreement are  
2 referred to as the "Oral Loans;" the Oral Loans together with the  
3 Written Loans are referred to as the "Loans").

4 Yniguez transferred all funds to Roque as agreed. Roque  
5 never tendered any payments to Yniguez on the Loans. He also  
6 never transferred any interest in EFR to her or shared any of  
7 EFR's net profits with her as promised. Consequently, Yniguez  
8 filed suit against Roque and his d/b/a EFR in state court on  
9 February 14, 2011, for breach of contract. At some point prior to  
10 the suit, Roque terminated Yniguez's employment and broke off the  
11 engagement.

12 While the state court suit was pending against Roque and EFR,  
13 on April 13, 2011, Roque, as the sole shareholder, created EFR  
14 Insurance Agency, Inc. ("EFR Inc.") and transferred all of EFR's  
15 assets to the newly-formed corporation. Prior to this, Yniguez  
16 had obtained an entry of default against Roque and EFR. She did  
17 not discover EFR Inc.'s existence until mid-May 2011.

18 **B. Postpetition events**

19 Roque filed an individual chapter 7 bankruptcy case on May 6,  
20 2011, valuing his d/b/a EFR at \$5,100 and representing that his  
21 checking and savings accounts held \$16.00. In his Schedule F,  
22 Roque listed the state court suit with Yniguez, but did not list  
23 the loan debt. He did not disclose an interest in EFR Inc.  
24 anywhere in his petition.

25 According to Yniguez, the state court entered a default  
26 judgment against Roque and EFR on May 16, 2011, but we have no  
27 documentation proving this fact in the record. However, because  
28 of the pending bankruptcy, Yniguez made no attempt to collect on

1 the default judgment.

2 When Yniguez discovered that Roque had created EFR Inc. prior  
3 to his filing bankruptcy, she amended her state court complaint to  
4 include the corporation as a defendant. EFR Inc. was served, and  
5 Yniguez later submitted a request for judgment against EFR Inc.  
6 The state court denied her request, determining that the  
7 bankruptcy court first had to rule that EFR Inc. was not part of  
8 Roque's bankruptcy estate.

9 **1. The nondischargeability action**

10 Yniguez filed an adversary complaint against Roque on  
11 August 23, 2011, seeking a determination that the Loans were  
12 excepted from discharge under § 523(a)(2)(A).<sup>4</sup> Yniguez alleged  
13 that Roque had knowingly made false representations when he  
14 promised to repay the Loans in order to obtain \$162,190 from her,  
15 that she relied on his representations, and that she had been  
16 damaged in the amount of the lost funds, plus interest, as a  
17 result. Yniguez also prayed for attorney's fees and costs.

18 Roque's initial answer denied all allegations in the  
19 complaint. For reasons unknown, Roque filed another answer on or  
20 about June 8, 2012, this time admitting the indebtedness to  
21 Yniguez (although not the amount), but denying all other  
22 allegations in the complaint.

23 The bankruptcy court ordered that all discovery be completed  
24 by April 13, 2012.

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27 <sup>4</sup> Yniguez's complaint also sought to deny Roque's discharge  
28 under § 727(a)(2). This claim was later denied upon her motion  
for summary judgment and subsequently dismissed. It is not  
subject to this appeal.

1           **2. Yniguez's first motion to compel discovery**

2           Yniguez propounded her first set of interrogatories, requests  
3 for admissions ("RFAs") and request for production to Roque on  
4 January 17, 2012. After Roque failed to timely respond, on  
5 February 21, 2012, Yniguez sent Roque a meet and confer letter  
6 requesting that he respond to the discovery within ten days, or  
7 she would file a motion to compel. Roque failed to respond.

8           On March 16, 2012, Yniguez filed her first motion to compel  
9 discovery ("First Motion to Compel"), seeking Roque's compliance  
10 with discovery and a sanction of \$1,265.00 for attorney's fees and  
11 costs incurred in bringing the motion. Roque did not oppose the  
12 motion.

13           After a hearing on April 4, 2012, the bankruptcy court  
14 granted the First Motion to Compel in part and denied it in part  
15 ("Discovery Order"). The court ordered Yniguez to serve another  
16 set of discovery requests on Roque by April 6, 2012, and ordered  
17 that Roque submit his responses to Yniguez by no later than May 7,  
18 2012. Yniguez's request for monetary sanctions was denied.  
19 Yniguez served another set of discovery requests as ordered, which  
20 were a duplicate of what was sent on January 17, 2012. Roque  
21 timely provided certain records from his Bank of America accounts,  
22 but did not submit any responses to the RFAs or the  
23 interrogatories in violation of the Discovery Order.

24           **3. Yniguez's second motion to compel discovery**

25           After the court-ordered May 7 deadline had passed, on May 22,  
26 2012, Yniguez sent Roque a second meet and confer letter,  
27 instructing him to submit the required RFAs and interrogatories  
28 within ten days. In response, Roque appeared at Yniguez's

1 attorney's office on May 29, 2012, and told a staff member that he  
2 would provide the required responses within ten days. He did not.

3 On June 22, 2012, the bankruptcy court entered a civil minute  
4 order continuing the June 20, 2012 status conference to  
5 October 17, 2012, and ordering that all discovery, including any  
6 motions to compel discovery, be completed and/or filed by  
7 September 30, 2012.

8 When Roque had still failed to respond to the RFAs and  
9 interrogatories, Yniguez filed her second motion to compel  
10 discovery ("Second Motion to Compel") on August 14, 2012, seeking  
11 Roque's compliance with discovery, a monetary sanction of  
12 \$1,265.00 for attorney's fees and costs incurred in bringing the  
13 motion, a sanction precluding Roque from offering any further  
14 evidence in his defense, and a sanction of default for Roque's  
15 failure to comply with the Discovery Order.

16 The bankruptcy court decided the merits of the Second Motion  
17 to Compel without oral argument on September 5, 2012. It denied  
18 the motion as to the RFAs, because (1) an order compelling Roque's  
19 compliance was unnecessary, as the RFAs were effectively deemed  
20 admitted per Civil Rule 36(a)(3) based on his failure to respond,  
21 and (2) the automatic remedy of Civil Rule 36(a)(3) was a  
22 sufficient sanction, which is why, reasoned the court, requests  
23 for admissions were not listed in Civil Rule 37(a)(3) as a basis  
24 for a motion to compel discovery. To the extent the Second Motion  
25 to Compel sought relief for Roque's failure to respond to the  
26 interrogatories and his incomplete responses to requests for  
27 production, the motion was continued to October 3, 2012. Yniguez  
28 was ordered to submit by no later than September 26, 2012, a

1 supplemental declaration and copies of all discovery requests to  
2 which Roque had not responded or provided an incomplete response.

3 Roque filed an untimely opposition to the Second Motion to  
4 Compel on September 5, 2012, contending that he had either  
5 provided the requested documents or did not possess the documents  
6 Yniguez had requested. Roque did not explain why he had not  
7 answered the interrogatories.

8 On September 25, 2012, Yniguez filed the ordered supplemental  
9 declaration, listing the interrogatory and production requests  
10 propounded to Roque and showing the responses, or lack thereof,  
11 Roque had provided.

12 On October 2, 2012, the parties filed a joint status  
13 conference statement stating that Roque had not propounded any  
14 discovery on Yniguez, and that he did not anticipate doing so. In  
15 any event, the discovery deadline had already passed on  
16 September 30.

17 At the continued hearing on the Second Motion to Compel on  
18 October 3, 2012, Roque admitted that he had not provided answers to  
19 the interrogatories by May 7, 2012, as required by the Discovery  
20 Order, but contended that he had not received them from Yniguez.  
21 The hearing on the Second Motion to Compel was continued again to  
22 November 7, 2012.

23 On October 31, 2012, Yniguez filed a document stating that  
24 Roque had finally responded to the propounded interrogatories and  
25 requests for production, and that she was satisfied with his  
26 responses.

27 After the continued hearing on November 7, 2012, the  
28 bankruptcy court entered a civil minute order granting Yniguez's



1 Second Motion to Compel to the extent it requested reasonable  
2 expenses. The court did not find Roque's representation that he  
3 had not received Yniguez's interrogatories credible. Roque had  
4 admitted that he received Yniguez's requests for production, which  
5 were sent with her interrogatories on January 17, 2012, and that  
6 he had responded by delivering certain documents. Accordingly,  
7 Yniguez was awarded monetary sanctions of \$1,265.00 under Civil  
8 Rule 37(b)(2)(C). The court denied the motion as moot to the  
9 extent it sought discovery Roque had ultimately provided.

10 **4. Yniguez's motion for summary judgment**

11 Sixteen months after filing her adversary complaint, Yniguez  
12 filed a motion for summary judgment under § 523(a)(2)(A) and  
13 § 727(a)(2) on December 17, 2012 (the "MSJ"). The MSJ recited the  
14 facts regarding the Written Loans and the Oral Loans, providing  
15 all dates and amounts. Yniguez argued that Roque, who was also  
16 her employer and fiancée, induced her to make the Loans by making  
17 a series of intentional misrepresentations regarding the terms of  
18 repayment, the transfer of profits, and the grant of a percentage  
19 interest in EFR. Yniguez argued that she relied on Roque's  
20 misrepresentations and made the Loans over fifteen months,  
21 totaling \$162,190. Contained within the MSJ were the RFAs that  
22 were deemed admitted. In support, Yniguez submitted her separate  
23 statement of undisputed facts.

24 A hearing on the MSJ was set for January 16, 2013. Roque did  
25 not file an opposition to the MSJ.

26 **5. Roque's motion to continue the MSJ**

27 On January 3, 2013, Roque filed an ex-parte motion to  
28

1 continue the MSJ under Civil Rule 56(d)<sup>5</sup> so that he could obtain  
2 counsel to conduct his own discovery and seek to have the RFAs  
3 withdrawn ("Motion to Continue"). Roque contended that  
4 withdrawing the admissions and allowing discovery would enable him  
5 to obtain evidence which could raise triable issues of fact,  
6 including whether actual intent to defraud ever existed. Roque  
7 further contended that he lacked the expertise and sufficient time  
8 to prepare the responses to Yniguez's discovery. Therefore,  
9 argued Roque, because a continuance could defeat the MSJ, good  
10 cause existed to continue it for 180 days.

11 Yniguez opposed the Motion to Continue, contending that it  
12 should be denied for several reasons. First, throughout the  
13 adversary proceeding, which had been filed a year and a half  
14 earlier, Roque had sat on his rights, repeatedly delaying or  
15 making excuses for his non-performance. He had not filed any  
16 motions, propounded discovery, or even filed an opposition to the  
17 MSJ or disputed her statement of facts. Second, good cause did  
18 not exist to continue discovery when Roque had made no attempt to  
19 conduct discovery, he answered Yniguez's discovery only after two  
20 motions to compel had been filed, and the discovery cutoff was  
21 four months earlier. Finally, argued Yniguez, Roque's lack of  
22 expertise of the rules or lack of time was no excuse; if time was  
23 a factor he could have asked counsel for a continuance, but he  
24 chose instead not to provide any discovery responses until  
25 compelled to do so.

26

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27 <sup>5</sup> Roque's Motion to Continue referenced Civil Rule 56(f), but  
28 former Civil Rule 56(f) became Civil Rule 56(d) under the 2010  
amendments, which were in effect at the time.

1 Without a hearing, the bankruptcy court entered an order on  
2 January 7, 2013, denying the Motion to Continue on the grounds  
3 that Roque had not explained his failure to retain counsel until  
4 now.

5 **6. The bankruptcy court's decision on the MSJ**

6 At the hearing on January 16, 2013, Roque did not expressly  
7 oppose the MSJ, but he did renew his request for a continuance,  
8 which was denied. The bankruptcy court then announced that its  
9 tentative ruling, granting summary judgment on the § 523(a)(2)(A)  
10 claim and denying it as to the § 727(a)(2) claim, would be its  
11 final ruling. The court determined that Yniguez had established  
12 the necessary elements for fraud under § 523(a)(2)(A), and ordered  
13 that she was entitled to summary judgment determining that the  
14 Loans totaling \$162,190 were nondischargeable. An order was  
15 entered on January 24, 2013 (the "MSJ Order"). Roque's timely  
16 appeal followed.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
19 and 157(b)(2)(I) & (J). We now address our jurisdiction over this  
20 appeal.

21 Generally, orders granting partial summary without the  
22 certification required by Civil Rule 54(b) are interlocutory  
23 orders. Belli v. Temkim (In re Belli), 268 B.R. 851, 856-57 (9th  
24 Cir. BAP 2001). Unlike final orders, interlocutory orders decide  
25 merely one aspect of the case without disposing of the case in its  
26 entirety on the merits. See United States v. Real Prop. Located  
27 at 475 Martin Ln., Beverly Hills, Cal., 545 F.3d 1134, 1141 (9th  
28 Cir. 2008). The bankruptcy court granted the MSJ only as to

1 Yniguez's claim under § 523(a)(2)(A). However, once her motion to  
2 dismiss the § 727 claim was granted on April 1, 2013, the MSJ  
3 Order became a final, appealable order.<sup>6</sup> Dannenberq v. Software  
4 Toolworks, Inc., 16 F.3d 1073, 1075 (9th Cir. 1994)(judgments  
5 whose finality would normally depend upon a Civil Rule 54(b)  
6 certificate may be treated as final and appealable if remaining  
7 claims subsequently have been finalized)(citations omitted).

8 Orders denying a motion for a continuance and granting a  
9 motion to compel discovery are also generally interlocutory. A  
10 court's ruling on a motion to continue does not end the  
11 litigation. The same is true for a motion to compel discovery.  
12 United States ex rel. Poque v. Diabetes Treatment Ctrs. of Am.,  
13 Inc., 444 F.3d 462, 471 (6th Cir. 2006); Hoffenberg v. Cohen  
14 (In re Towers Fin. Corp.), 164 B.R. 719, 720 (S.D.N.Y. 1994)  
15 ("Bankruptcy court orders granting or denying discovery do not  
16 finally dispose of an entire claim on which relief may be granted,  
17 and therefore are generally treated as interlocutory and not  
18 appealable as of right."). Nonetheless, interlocutory orders such  
19 as these merge into the final order deciding the merits. See Real  
20 Prop. Located at 475 Martin Ln., Beverly Hills, Cal., 545 F.3d at  
21 1141 (interlocutory orders entered prior to the judgment merge  
22 into the judgment and may be challenged on appeal). Consequently,  
23 the continuance order and the orders respecting both motions to  
24 compel discovery merged into the final MSJ Order. As such, they

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25  
26 <sup>6</sup> Although the bankruptcy court entered the MSJ Order  
27 granting summary judgment in part, no judgment has ever been  
28 entered. Nonetheless, because 150 days has run since the entry of  
the MSJ Order, no separate judgment is necessary under Civil  
Rule 58 for that order to be final and appealable.

1 can be challenged on appeal. This is true even though these  
2 orders were not designated in Roque's notice of appeal. Disabled  
3 Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 872  
4 n.7 (9th Cir. 2004)(appeal of final judgment draws into question  
5 all earlier, non-final orders and rulings which produced the  
6 judgment).

7 Accordingly, we have jurisdiction under 28 U.S.C. § 158.

8 **III. ISSUES**

9 1. Did the bankruptcy court abuse its discretion in granting the  
10 motions to compel discovery?

11 2. Did the bankruptcy court abuse its discretion in denying the  
12 Motion to Continue?

13 3. Did the bankruptcy court err in granting the MSJ as to the  
14 § 523(a)(2)(A) claim?

15 **IV. STANDARDS OF REVIEW**

16 Our standard in reviewing the bankruptcy court's decision to  
17 grant a motion for summary judgment is de novo. Sigma Micro Corp.  
18 v. Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 783  
19 (9th Cir. 2007).

20 An order compelling a party to comply with discovery requests  
21 is reviewed for an abuse of discretion. Epstein v. MCA, Inc.,  
22 54 F.3d 1422, 1423 (9th Cir. 1995)(per curiam). The imposition of  
23 discovery sanctions is reviewed for an abuse of discretion. See  
24 Paladin Assocs., Inc. v. Mont. Power Co., 328 F.3d 1145, 1164 (9th  
25 Cir. 2003). The bankruptcy court's decision not to permit  
26 additional discovery pursuant to Civil Rule 56(d) is also reviewed  
27 for an abuse of discretion. Chance v. Pac-Tel Teletrac Inc.,  
28 242 F.3d 1151, 1161 n.6 (9th Cir. 2001)(applying former Civil

1 Rule 56(f)). "We will only find that the [bankruptcy] court  
2 abused its discretion if the movant [under Civil Rule 56(d)]  
3 diligently pursued its previous discovery opportunities, and if  
4 the movant can show how allowing additional discovery would have  
5 precluded summary judgment." Qualls by and through Qualls v. Blue  
6 Cross of Cal., Inc., 22 F.3d 839, 844 (9th Cir. 1994). A  
7 bankruptcy court abuses its discretion if it applied the wrong  
8 legal standard or its findings were illogical, implausible or  
9 without support in the record. TrafficSchool.com, Inc. v. Edriver  
10 Inc., 653 F.3d 820, 832 (9th Cir. 2011).

11 We can affirm on any basis supported by the record, even  
12 where the issue was not expressly considered by the bankruptcy  
13 court. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),  
14 887 F.2d 955, 957 (9th Cir. 1989).

#### 15 V. DISCUSSION

#### 16 A. The bankruptcy court did not abuse its discretion respecting 17 the motions to compel discovery.

18 The only argument Roque raises here is that the bankruptcy  
19 court abused its discretion in failing to give him, a pro se  
20 litigant, the proper deference required as to Yniguez's motions to  
21 compel. Roque does not explain exactly what "deference" he should  
22 have been given, but, considering the record, we disagree.

23 The initial discovery deadline in this case was set for  
24 April 13, 2012. Yniguez propounded her first set of  
25 interrogatories, RFAs and requests for production to Roque on  
26 January 17, 2012. The documents stated that responses were  
27 subject to Civil Rules 26, 33 and 34, and Rule 7026. When Roque  
28 failed to comply, Yniguez's counsel sent Roque a meet and confer

1 letter requesting that he respond to the propounded discovery  
2 within ten days or risk facing a motion to compel. Roque still  
3 failed to respond.

4       Roque did not oppose Yniguez's First Motion to Compel. On  
5 April 4, 2012, the bankruptcy court entered the Discovery Order,  
6 granting the First Motion to Compel to the extent it sought  
7 discovery and ordering Roque to submit his responses to the  
8 interrogatories, RFAs and requests for production to Yniguez by no  
9 later than May 7, 2012. Thus, in addition to the time Roque had  
10 to answer discovery between January 17 and April 4, 2012, the  
11 Discovery Order gave Roque an additional thirty-three days to  
12 submit his responses, including the RFAs. Yniguez's first request  
13 for monetary sanctions was denied.

14       In response to the Discovery Order, Roque provided only  
15 certain bank records; he did not submit any responses to the RFAs  
16 or the interrogatories by the May 7 deadline. Yniguez sent Roque  
17 a second meet and confer letter on May 22, 2012, instructing him  
18 to submit his answers to the RFAs and interrogatories as ordered  
19 within ten days. Although Roque promised that he would, he did  
20 not. The discovery deadline was then extended to September 30.

21       When Roque had still not responded to the Discovery Order,  
22 Yniguez filed her Second Motion to Compel on August 14, 2012,  
23 seeking Roque's compliance, a monetary sanction of \$1,265.00 for  
24 attorney's fees and costs incurred in bringing the motion and  
25 other relief. Roque filed an untimely opposition on the day the  
26 bankruptcy court rendered its decision on the matter. The court  
27 denied the motion as to the RFAs, because Roque's failure to  
28 respond to such matters had been deemed admitted under Civil

1 Rule 36(a)(3). The motion as to Roque's failure to respond to  
2 interrogatories and his incomplete responses to requests for  
3 production was continued to October 3. At that continued hearing,  
4 Roque admitted he had not provided answers to the interrogatories  
5 by May 7, 2012, as directed by the Discovery Order.

6 Because Roque had violated the Discovery Order, and because  
7 Yniguez had to file another motion to compel before Roque finally  
8 provided the ordered responses, the bankruptcy court granted  
9 Yniguez's Second Motion to Compel to the extent it requested  
10 reasonable expenses of \$1,265.00 incurred in bringing the motion  
11 under Civil Rule 37(b)(2)(C),<sup>7</sup> incorporated by Rule 7037.  
12 Contrary to Roque's contention, the bankruptcy court did not grant  
13 Yniguez's requests to preclude him from offering evidence in his  
14 defense or for default.

15 While we recognize the leniency afforded pro se litigants in  
16 matters of pleadings and briefing,<sup>8</sup> they are nonetheless not  
17 excused from compliance with the rules of procedure. Warrick v.  
18 Birdsell, 278 B.R. 182, 187 (9th Cir. BAP 2002); Ghazali v. Moran,  
19 46 F.3d 52, 54 (9th Cir. 1995)(although pro se pleadings are  
20 construed liberally, pro se litigants are nonetheless bound by the  
21 rules of procedure); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir.  
22 1987), overruled on other grounds by Lacey v. Maricopa Cnty.,

23  
24 <sup>7</sup> When a party fails to obey a discovery order, instead of or  
25 in addition to the sanctions enumerated in Civil Rule 37(b)(2)(A),  
26 "the court must order the disobedient party . . . to pay the  
27 reasonable expenses, including attorney's fees, caused by the  
28 failure, unless the failure was substantially justified or other  
circumstances make an award of expenses unjust."

<sup>8</sup> See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
(9th Cir. 1986)(citing cases).



1 693 F.3d 896 (9th Cir. 2012)("Pro se litigants must follow the  
2 same rules of procedure that govern other litigants.").

3 Roque's failure to respond to discovery, particularly after  
4 being ordered to do so, is not analogous to a case where a pro se  
5 litigant has submitted an inartful pleading the court should  
6 construe with liberality. Even if Roque was initially ignorant of  
7 the discovery requirements of Civil Rules 26, 33 and 34, he was on  
8 notice upon entry of the Discovery Order on April 4, 2012, of what  
9 was required. Other than submitting a few bank records, Roque  
10 failed to submit responses to the RFAs or the interrogatories,  
11 which forced Yniguez to file the Second Motion to Compel and incur  
12 attorney's fees and costs, but only after she sent Roque a second  
13 courtesy letter asking that he submit the responses within ten  
14 days, which he ignored.

15 For his failure to comply with the Discovery Order, the  
16 bankruptcy court sanctioned Roque \$1,265.00 under Civil  
17 Rule 37(b)(2)(C) for Yniguez's reasonable expenses incurred  
18 bringing the Second Motion to Compel. To the extent Roque  
19 contends the sanctions were unjustified, we discern no error in  
20 that ruling. Other than his pro se status, which is a  
21 non starter, Roque offered no substantial justification for why he  
22 could not comply with discovery or, more importantly, the  
23 Discovery Order. Thus, because the Second Motion to Compel was a  
24 proper Civil Rule 37(b) motion, an award of expenses including  
25 attorney's fees was appropriate.

26 Roque was given more than ample time and opportunity to  
27 respond to discovery before he was sanctioned, and his argument to  
28 the contrary lacks merit. The bankruptcy court and counsel for

1 Yniguez gave Roque great leniency, particularly because he is a  
2 pro se litigant. Accordingly, we see no abuse of discretion by  
3 the bankruptcy court respecting its decisions on the motions to  
4 compel discovery.<sup>9</sup>

5 **B. The bankruptcy court did not abuse its discretion in denying  
6 the Motion to Continue.**

7 Under Civil Rule 56(d), incorporated by Rule 7056, the  
8 bankruptcy court may deny a summary judgment motion, or continue  
9 the hearing on the motion, where the nonmoving party by affidavit  
10 shows that it "cannot present facts essential to justify its  
11 opposition[.]" Pursuant to this rule, summary judgment is to be  
12 refused "where the nonmoving party has not had the opportunity to  
13 discover information that is essential to his opposition."

14 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986).

15 Generally, a party files a Civil Rule 56(d) motion after the  
16 opposing party files a motion for summary judgment early in the  
17 proceedings, before the parties have had ample time to conduct  
18 discovery.

19 To justify a continuance of summary judgment under Civil  
20 Rule 56(d), a party must: (1) set forth in affidavit form the

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22 <sup>9</sup> Although not raised by Roque, we agree with the bankruptcy  
23 court's decision to deny the Second Motion to Compel to the extent  
24 it sought responses from Roque on the RFAs, because the RFAs were  
25 already deemed admitted. Civil Rule 36(a)(3) provides that a  
26 party's failure to timely respond to a request for admission  
27 within thirty days of being served results in the admission being  
28 conclusively deemed admitted. Conlon v. United States, 474 F.3d  
616, 621 (9th Cir. 2007). The operation of Civil Rule 36(a)(3) is  
automatic and self-executing. F.T.C. v. Medicor LLC,  
217 F.Supp.2d 1048, 1053 (C.D. Cal. 2002) ("No motion to establish  
the admissions is needed because Federal Rule of Civil Procedure  
36(a) is self-executing.") (citing Schwarzer, Tashima & Wagstaffe,  
CAL. PRACTICE GUIDE: FED. CIV. PROC. BEFORE TRIAL, at ¶¶ 811-12  
(Rutter Group 2002)).

1 specific facts it hopes to elicit through further discovery;  
2 (2) show the facts sought exist; and (3) show that the sought  
3 after facts are essential to oppose summary judgment. Family Home  
4 & Fin. Ctr. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th  
5 Cir. 2008); Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 524 (9th  
6 Cir. 1989) (party seeking postponement of a summary judgment  
7 motion must "show how additional discovery would preclude summary  
8 judgment and why [it] cannot immediately provide 'specific facts'  
9 demonstrating a genuine issue of material fact.")(citing former  
10 Civil Rule 56(f)). The burden is on the party seeking to conduct  
11 additional discovery to put forth sufficient facts to show that  
12 the evidence sought exists. Volk v. D.A. Davidson & Co., 816 F.2d  
13 1406, 1416 (9th Cir. 1987).

14 Roque contends the bankruptcy court abused its discretion by  
15 denying the Motion to Continue the MSJ because a continuance was  
16 of immense importance to him, considering the amount of money at  
17 stake, and because his affidavit established grounds to grant a  
18 continuance. We disagree that Roque's affidavit satisfied the  
19 requirements for continuance of a summary judgment motion. While  
20 he alluded that further discovery "could" raise triable issues of  
21 fact to oppose the MSJ, such as whether he made any false  
22 statements to Yniguez, or whether he actually intended to defraud  
23 her, or whether Yniguez unjustifiably relied on any alleged false  
24 statements, he did not establish: (1) what "specific facts" he  
25 hoped to elicit through further discovery, or (2) that these facts  
26 actually existed, or (3) why these presumably material facts,  
27 which were not within Yniguez's exclusive control, could not have  
28 been presented before to oppose the MSJ. The bankruptcy court

1 found as much, denying the Motion to Continue on the basis that  
2 Roque had failed to explain why he had not retained counsel until  
3 now.

4 Recognizing that we can affirm on any basis supported by the  
5 record, the bankruptcy court was also free to deny the Motion to  
6 Continue on the grounds that Roque failed to conduct discovery in  
7 a diligent manner. Pfingston v. Ronan Eng'g Co., 284 F.3d 999,  
8 1005 (9th Cir. 2002)(applying former Civil Rule 56(f) and holding  
9 that the failure to conduct discovery diligently is grounds for  
10 denial of a continuance of a motion for summary judgment)(citing  
11 Mackey, 867 F.2d at 524)("A movant cannot complain if it fails  
12 diligently to pursue discovery before summary judgment"); Nidds v.  
13 Schindler Elevator Corp., 113 F.3d 912, 921 (9th Cir. 1996)(if the  
14 party moving for a Civil Rule 56(f) continuance has had ample  
15 opportunity to conduct discovery, and has not diligently done so,  
16 the request for further discovery may be denied). "Stated another  
17 way, 'we will only find that the [bankruptcy] court abused its  
18 discretion if the movant diligently pursued its previous discovery  
19 opportunities, and if the movant can show how allowing additional  
20 discovery would have precluded summary judgment.'" Chance,  
21 242 F.3d at 1161 n.6 (quoting Byrd v. Guess, 137 F.3d 1126, 1131  
22 (9th Cir. 1998)).

23 Yniguez did not file the MSJ until sixteen months after she  
24 filed her adversary complaint and nearly three months after the  
25 close of discovery, which was not "early" in the proceeding. The  
26 discovery deadline was initially set for April 13, 2012, but,  
27 because of Roque's dilatory conduct, it was extended until  
28 September 30, 2012. Roque never propounded any discovery of his

1 own, and he never sought any extensions to do so. In the joint  
2 status conference statement filed on October 2, 2012, Roque stated  
3 that he had not propounded discovery and that he did not  
4 anticipate propounding any. Roque filed his Motion to Continue  
5 well after the close of discovery – three months later to be exact  
6 – and just thirteen days before the MSJ hearing.

7 Accordingly, on this record, the bankruptcy court was within  
8 its discretion to deny the Motion to Continue.

9 **C. The bankruptcy court erred in granting the MSJ as to the  
10 § 523(a)(2)(A) claim.**

11 **1. Summary judgment standards**

12 Summary judgment is appropriate where the pleadings and the  
13 evidence show that no genuine issue of any material fact exists  
14 and that the moving party is entitled to a judgment as a matter of  
15 law. See Civil Rule 56(a), incorporated by Rule 7056. In  
16 evaluating the motion, we view all facts and inferences in the  
17 light most favorable to the non-moving party. Anderson, 477 U.S.  
18 at 250. Failure to "properly address another party's assertion of  
19 fact as required by [Civil] Rule 56(c)" permits the court to  
20 "consider the fact undisputed." Civil Rule 56(e)(2). If facts  
21 are considered undisputed because a party fails to properly  
22 address them, the court may "grant summary judgment if the motion  
23 and supporting materials – including facts considered undisputed –  
24 show the movant is entitled to it[.]" Civil Rule 56(e)(3).

25 **2. Roque's failure to oppose the MSJ does not preclude our  
26 review**

27 Because Roque failed to oppose the MSJ or file his own  
28 statement of disputed facts in response, the facts contained in

1 Yniguez's statement of undisputed facts ("SOF") filed in support  
2 of the MSJ were uncontroverted. See Local Rule 9014-1(f)(B);<sup>10</sup>  
3 Civil Rule 56(e)(2). As a result, he is also unable to challenge  
4 these facts on appeal. United States v. Kitsap Physicians Serv.,  
5 314 F.3d 995, 999 (9th Cir. 2002).

6 Nonetheless, Roque contends that the evidentiary record  
7 failed to support the MSJ. Notwithstanding his failure to  
8 preserve any factual issues for appeal, we will examine the record  
9 to determine if any basis for reversal is clearly evident, because  
10 our de novo review necessarily includes determination as to  
11 whether Yniguez is entitled to judgment as a matter of law. See  
12 Hoover v. Switlik Parachute Co., 663 F.2d 964, 967 (9th Cir. 1981)  
13 ("Even where no evidence is presented in opposition to the motion,  
14 summary judgment should not be granted if the evidence in support  
15 of the motion is insufficient.")(citations omitted).

16 **3. Yniguez's evidence did not establish all of the**  
17 **necessary elements for fraud under § 523(a)(2)(A).**

18 The Code excepts from discharge any debt for money, property,  
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20 <sup>10</sup> Local Rule 9014-1(f)(B) provides, in relevant part:

21 Opposition, if any, to the granting of the motion shall be in  
22 writing and shall be served and filed with the Court by the  
23 responding party at least fourteen (14) days preceding the  
24 date or continued date of the hearing. Opposition shall be  
25 accompanied by evidence establishing its factual allegations.  
26 Without good cause, no party shall be heard in opposition to  
27 a motion at oral argument if written opposition to the motion  
28 has not been timely filed. Failure of the responding party  
to timely file written opposition may be deemed a waiver of  
any opposition to the granting of the motion or may result in  
the imposition of sanctions.

Failure to file the separate statement shall be construed as  
consent to resolution of the motion and all disputed material  
factual issues pursuant to Fed. R. Civ. P. 43(c).

1 services, or credit obtained by false pretenses, a false  
2 representation, or actual fraud. § 523(a)(2)(A). To prevail on a  
3 claim under § 523(a)(2)(A), a creditor must demonstrate five  
4 elements: (1) misrepresentation, fraudulent omission or deceptive  
5 conduct by the debtor; (2) knowledge of the falsity or  
6 deceptiveness of the debtor's statement or conduct; (3) an intent  
7 to deceive; (4) justifiable reliance by the creditor on the  
8 debtor's statement or conduct; and (5) damage to the creditor  
9 proximately caused by its reliance on the debtor's statement or  
10 conduct. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 35 (9th  
11 Cir. BAP 2009)(citing Turtle Rock Meadows Homeowners Ass'n v.  
12 Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000)). "The  
13 creditor bears the burden of proof to establish all five of these  
14 elements by a preponderance of the evidence." Id. (citing Slyman,  
15 234 F.3d at 1085).

16 RFA nos. 3 and 4 established the Written Loans Yniguez made  
17 to Roque for \$47,000. RFA no. 5 established that Yniguez  
18 transferred to Roque "all loan amounts agreed upon." RFA no. 6  
19 established that "the loans . . . contained conditions of  
20 repayment." In other words, the Loans were not gifts, and Yniguez  
21 expected to be repaid. RFA no. 7 established that Roque failed to  
22 make "any loan payments" to Yniguez. RFA nos. 14 and 15  
23 established that Roque never began repayment of the Written Loans.  
24 Finally, RFA no. 16 established that Roque never intended to pay  
25 "any of the loan payments" to Yniguez.

26 SOF nos. 4-17 established each of the Loans Yniguez made to  
27 Roque. SOF no. 18 established that Roque never tendered any  
28 payments on the "loans." SOF no. 20 established that Roque had

1 solicited the "loans" from Yniguez without having any intention of  
2 ever repaying any of them.

3       As the bankruptcy court correctly found, the undisputed facts  
4 showed that Roque made misrepresentations when he agreed to the  
5 Loans and promised to repay the money to Yniguez. While a broken  
6 promise of future performance is not ordinarily a false  
7 representation for purposes of § 523(a)(2)(A), "a promise made  
8 with a positive intent not to perform or without a present intent  
9 to perform satisfies § 523(a)(2)(A)." Rubin v. West  
10 (In re Rubin), 875 F.2d 755, 759 (9th Cir. 1989). The undisputed  
11 facts show that Roque never intended to repay any of the Loans as  
12 agreed. Roque's failure to repay any amount of the Loans is  
13 further evidence that he never intended to perform his promise.  
14 So is the fact that he never transferred any interest in EFR to  
15 Yniguez or shared net profits with her as agreed. Accordingly,  
16 Roque's promises that he would repay the Loans were false  
17 representations, thereby satisfying the first element.

18       The record also establishes the second and third elements –  
19 knowledge of the falsity and an intent to deceive. Because Roque  
20 never intended to repay the Loans, he knew his promises to repay  
21 were false when he made them. Further, as noted above, the fact  
22 that Roque never attempted to satisfy his agreement to transfer  
23 any interest in EFR to Yniguez or share net profits with her is  
24 additional evidence supporting knowledge of his false statements  
25 of repayment. Roque's failure to repay the Loans, combined with  
26 his admission that he never intended to repay them, allows us to  
27 infer that Roque intended to deceive Yniguez when he promised  
28 repayment each time she extended a loan to him. Intent to deceive



1 is a question of fact which may be inferred from surrounding  
2 circumstances. Cowan v. Kennedy (In re Kennedy), 108 F.3d 1015,  
3 1018 (9th Cir. 1997). See also 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][d]  
4 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012)(intent may  
5 be inferred from the fact that the debtor failed to take any steps  
6 to perform under the contract).

7 We conclude, however, that Yniguez failed to establish the  
8 fourth element of justifiable reliance. Whether Yniguez  
9 justifiably relied on Rogue's misrepresentations is a question of  
10 fact. Eugene Parks Law Corp. Defined Benefit Pension Plan v.  
11 Kirsh (In re Kirsh), 973 F.2d 1454, 1456 (9th Cir. 1982); Deitz v.  
12 Ford (In re Deitz), 469 B.R. 11, 34 (9th Cir. BAP 2012). Nowhere  
13 in the record did Yniguez provide any direct, admissible evidence  
14 that she justifiably relied on Roque's false representations to  
15 repay the Loans. The RFAs made no reference to justifiable  
16 reliance and neither did the SOF. Unfortunately, Yniguez did not  
17 submit a declaration in support of the MSJ which could have  
18 established this fact. Yniguez's attorney simply argued in the  
19 MSJ that Yniguez "relied on the Debtor's misrepresentations and  
20 made a series of loans over 15 months totaling \$162,190.00." MSJ  
21 at 6:20-21. Arguments and statements of counsel are not evidence.  
22 Wood v. Stratos Prod. Dev., LLC (In re Ahaza Sys., Inc.), 482 F.3d  
23 1118, 1122 n.1 (9th Cir. 2007); Exeter Bancorporation v. Kemper  
24 Sec. Group, Inc., 58 F.3d 1306, 1312 n.5 (8th Cir. 1995)  
25 (statements of counsel are not evidence and do not create issues  
26 of fact)(citing United States v. Fetlow, 21 F.3d 243, 248 (8th  
27 Cir. 1994)).

28 The bankruptcy court essentially "inferred" that Yniguez must

1 have justifiably relied on Roque's false statements of repayment  
2 each time she extended a loan to him or she would not have given  
3 him the money. This may be a reasonable inference, especially  
4 considering their relationship, but we could not locate, and the  
5 bankruptcy court did not cite, any authority allowing a court to  
6 infer justifiable reliance, such as it can with intent. The only  
7 case we found held to the contrary, at least when the borrower and  
8 lender have a direct relationship. See In re Hulbert, 150 B.R.  
9 169, 172 (Bankr. S.D. Tex. 1993)(applying justifiable reliance  
10 standard and determining that when the case involves a direct  
11 borrowing relationship between lender and borrower, as opposed to  
12 a credit card relationship, the creditor must show that it relied  
13 on debtor's fraudulent representation in issuing the loan;  
14 reliance was not established because creditor offered no direct  
15 evidence on that issue). As a result, we vacate and remand the  
16 MSJ Order.

#### 17 VI. CONCLUSION

18 Based on the foregoing reasons, we AFFIRM the order denying  
19 Roque's Motion to Continue and AFFIRM the orders granting  
20 Yniguez's motions to compel discovery. However, we VACATE and  
21 REMAND the MSJ Order.

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